

If the Department determines that the rate, term or condition complained of is not reasonable, it may prescribe a reasonable rate, term or condition and may:

(1) terminate the unreasonable rate, term or condition; and

(2) substitute in the attachment agreement the reasonable rate, term or condition established by the Department.

This section clearly permits the Department to determine the reasonableness of the current rate, terminate that rate if found to be unreasonable, and substitute a new rate. However, certain of the Complainants' requests for relief do not relate to specifically enumerated powers of the Department, and other requests relate only to non-rate terms and conditions of conduit attachment contracts. These requests for relief are addressed below.

1. Retaliation

Regarding the non-rate relief requested, Greater Media seeks: (1) protection from retaliatory actions or omissions by NET regarding existing licensing agreements between the parties; and (2) a Department order directing NET to refrain from retaliatory activity as a result of Greater Worcester's failure to pay the March 1991 bill and the filing of the Complaint. While the Complainants have presented testimony relating to their fear of potential reprisals from NET, especially given their stated lack of alternatives to use of NET's carrying plant, the record presents no evidence of any such retaliatory behavior on the part of NET. The Complainants have failed to allege specific

instances of retaliatory activity by NET, and instead have requested a broad directive from the Department. Therefore, we deny the Complainants' request. We note, however, that in the event specific retaliatory activity is alleged, the Complainants are free to bring a complaint before the Department.

The Complainants also ask the Department to order NET to use its best efforts to process pending requests for conduit use. The Complainants submitted evidence that certain construction delays were the result of NET's actions (Exh. GM-1, p. 10). However, certain of these documents also refer to delays resulting from electric utility problems, and none of the documents provide evidence of intentional delays on the part of NET (Exh. GM-7, 9/13/91 letter to Board of Selectmen, 8/8/91 and 7/15/91 Memos from Brian Bedard). We also note that the Complainants' agreements with municipalities appear to recognize that construction activities are subject to possible delays as a result of utility procedures (See e.g., Exh. GM-7, 11/1/91 letter to Dennis Power). In fact, Mr. Moller testified that the Complainants have never been denied a renewal of a municipal franchise agreement (Tr. 1, p. 45).

We find that while there have been some delays in processing requests for conduit occupancy, such delays have not jeopardized the CATV franchising agreements at issue in this proceeding. Nonetheless, timely processing of pending requests for conduit use by NET is critical to the Complainants' business and the

Company shall continue to use its best efforts in processing such requests.

The Complainants also seek relief from unconditional payment of the disputed invoice dated March 1, 1991. Because NET has agreed not to attempt collection of the bill pending an order in this case, this issue will not be addressed further here (See Answer of NET to Motion for Interim Relief, p. 3).

2. Refunds

Greater Media also requests that the Department (1) determine that the rates charged by NET from January 1, 1984 to the present are unlawful and unreasonable; and (2) order a refund of any amount that exceeds a rate set by the Department, plus interest.

The majority of the provisions in 220 C.M.R. 45.00 mirror regulatory provisions enacted by the FCC (See 47 C.F.R. 1.1401, et seq.). Therefore, it is helpful to consider the manner in which issues raised in the instant proceeding have been addressed by the FCC.

In response to a recommendation that proposed FCC regulations allow for refunds from the date an unreasonable rate was initially charged by a utility, the FCC noted that the National Cable Television Association ("NCTA") suggested that "refunds from the date of the complaint are entirely appropriate in a complainant form of regulation" (First Report and Order in CC Docket 78-144, 68 F.C.C.2d 1585 (1978), p. 1600). The FCC modified its proposed regulations to conform with NCTA's

recommendation that refunds be allowed only from the date a complaint is filed "to avoid abuse and encourage early filing when rates are considered to be objectionable by the CATV operator" (*id.*).¹⁷ We agree with the FCC that complaints should be filed promptly when a dispute exists. Our regulations governing complaints regarding attachment rates have existed since 1984, yet Greater Media did not file a complaint with the Department until late 1991. While the Complainants state that their failure to dispute the rate prior to 1991 is attributable to fear of retaliation by NET during a period in which they were expanding their facilities, the record contains no evidence of retaliation or threats of retaliation by NET (Tr. 1, p. 10). In sum, we are not persuaded that Greater Media's delay in filing a Complaint is justified, and therefore, deny their request for relief dating back to 1984.¹⁸

In general, the Department is authorized to set rates only on a prospective basis. See D.P.U. 90-147, Edgartown Water Company (1990), p. 6; D.P.U. 90-213, Petition of Pittsfield City Council (1991), pp. 1-2. Both parties have cited Metropolitan District Commission v. Department of Public Utilities, 352 Mass

¹⁷ We note also, that the FCC's enabling statute governing conduit and pole attachments, 47 U.S.C. § 224, differs from the Department's statute in that it allows the FCC to "take such action as it deems appropriate and necessary."

¹⁸ With regard to NET's argument that the Department is limited to the remedies found in section 45.07, we note that failure to include a refund provision in this section of the regulations does not limit the Department's authority to allow such a remedy, under the appropriate circumstances.

18 (1967), in support of their positions. In Metropolitan District Commission, the Court upheld a Department finding that it did not have authority to award reparations, noting that "such a power must be expressly conferred by statute, as it was in the case of carriers (G.L. c. 159, § 14)" (at 26).

However, the facts in Metropolitan District Commission must be distinguished from the facts in the instant proceeding. Unlike the case at hand, in Metropolitan District Commission, the Court was faced with the issue of whether the Department could allow refunds of tarified rates. A tariff generally contains rates, charges, terms and conditions under which a utility or common carrier, subject to the Department's jurisdiction, may provide service. G.L. c. 159, § 19. A tariff must be filed with the Department and the Department must fulfill its statutory duty to determine whether the rates contained in the tariff are just and reasonable. The conduit attachment rates at issue in this proceeding are not tarified. They were not submitted to the Department for review, nor were they required to have been submitted for review. Therefore, the prohibition on awarding refunds as delineated by the court in Metropolitan District Commission does not apply to the facts in the instant case. Accordingly, we will allow any new rate established in this Order to be effective as to the Complainants as of the date the Complaint was filed. For the remainder of NET's conduit attachers, the rate will be adjusted as prescribed herein and the

adjusted rate will be effective as of July 1, 1992 (See Section III.B.3, infra).¹⁹

3. License Contracts

We are not persuaded by NET's argument that the "failure to agree" which it alleges is necessary to trigger the Department's jurisdiction may only be found where a contract contains a protest clause. In First Report and Order in CC Docket 78-144, supra, in response to the assertion that the FCC had no authority to abrogate terms of existing contracts, the Commission stated:

This view seems peculiar in that the invocation of Commission jurisdiction is predicated, according to legislative history, on the existence of a contractual agreement between the pole owner or controller and CATV operator. Without authority to alter unreasonable or unjust contractual rates, terms or conditions the Commission would be powerless to act in accordance with its mandate.

First Report, at 1590-1591.²⁰

Similarly, in Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp., PA-84-0016 (1985), the FCC stated:

claims relating to burdensome contract terms are ripe for adjudication at any time during the life of a contract pursuant to Section 224.

Gulfstream Cablevision at 2.

NET's own witness has stated that the terms of its contracts with conduit attachers are not negotiable (Tr. 2, p. 47).

¹⁹ We note that NET currently charges uniform rates for all conduit attachers; therefore, the modifications prescribed in this Order will also modify rates in contracts other than those between the Complainants and NET.

²⁰ See also Wytheville TeleCable v. Appalachian Power Co., PA-79-0007, 48 R.R.2d 684 (1980).

Therefore, we find that the Complainants had no choice but to sign the contracts as presented to them by NET. We also find that were the Complainants to attempt to file a complaint with the Department prior to entering into contracts with NET for licensing agreements, it is likely that they would have been forced to delay extension of their facilities and risk problems with local franchising authorities. Accordingly, we find that the execution of the contracts does not preclude the Complainants from seeking relief under 220 C.M.R. 45.00.

B. Rates

According to G.L. c. 166, § 25A(2), the Department has the authority to determine a reasonable rate for the use of conduit such that the rate is not less than the marginal cost nor more than the fully allocated cost of such conduit attachment. Furthermore, in resolving complaints from attachers, the Department is required to balance the interests of NET's ratepayers and CATV subscribers. G.L. c. 166, § 25A. By setting conduit attachment rates based on NET's fully allocated costs, attachers will provide a contribution to NET's revenues and thus benefit NET's ratepayers. In addition, setting rates based on fully allocated costs will result in attachers paying no more than their properly apportioned share of NET's costs, thus adequately reflecting the need to consider the interests of CATV subscribers. We note that with the modification discussed, infra, the parties agree that fully allocated costs are the appropriate basis for setting conduit attachment rates.

In regard to the Complainants' request that the Department set rates below fully allocated costs to reflect what the Complainants characterize, among other things, as the attachers' subordinate status, we find that the record does not support such a modification to the rates. Although NET's contracts with its licensees include certain clauses that give NET the authority to remove conduit attachments without providing for alternative arrangements (Exh. GM-1, p. 11), there is no evidence that these clauses have been implemented. Accordingly, fully allocated costs shall be used to set NET's conduit attachment rates.

Conduit attachers presently pay \$1.90 per year for each foot of full duct leased from NET.²¹ In order to determine the reasonableness of this rate, it is necessary to calculate the fully allocated cost of conduit attachment on a per-foot basis. Such calculation requires the determination of the carrying cost to NET of its conduit and the amount of usable space, *i.e.*, the applicable quantity of feet of duct over which such costs should be distributed.

The parties dispute the sources of data for both the carrying cost and the usable space. The Department's regulations state: "[d]ata and information should be based on historical or original cost methodology, to the extent possible. Data should be derived from Form M, FERC 1, or other reports filed with the state or regulatory agencies." 220 C.M.R. § 45.04. NET submits

²¹ See section III.B.4., *infra*, for a discussion of NET's half-duct rates.

its Form M report to the Department annually, consistent with statutory requirements. G.L. c. 159, § 32.²² NET submits a COSS to the Department as supporting documentation for its transitional rate restructuring filings. The Department relies on the COSS in order to set rates for NET's tariffed services. NET, D.P.U. 89-300 (1990).²³

Form M data are readily available, are filed annually, are less burdensome to apply to specific services than are the COSS data, and will facilitate resolution of future rate disputes. Furthermore, the overall impact of conduit attachment rates on NET's total intrastate revenue is minimal (RR-DPU-7). For these reasons, we find that the gain in simplicity from using the Form M offsets any possible benefit of the more detailed cost data that NET's COSS may offer. Accordingly, NET's Form M shall be used as the data source for the calculation of conduit net investment, carrying charges (with the exception of rate of return), and usable space. NET shall use the most recent Department-established rate of return in its calculation of conduit attachment rates. See, NET, D.P.U. 86-33-G (1986).

²² As required by statute, NET submits its Form M to the Department by March 31 of each year. However, on March 18, 1992, the Department approved NET's request to delay until May 21, 1992, its 1991 filing.

²³ NET submitted a COSS in December 1989 in support of its filing in D.P.U. 89-300; in February 1991, in support of its filing in D.P.U. 91-30; and in March 1992, in support of its filing in D.P.U. 92-100.

The specific calculation of the fully allocated cost is discussed below.

1. Conduit Carrying Cost

NET reports its gross conduit investment and net conduit investment in its Form M. The record indicates that the net conduit investment is calculated by subtracting accumulated depreciation and accumulated taxes from the gross conduit investment (Exh. GM-3, Table 4; Exh. NET-1, Attachment 2, p. 2). Although the parties dispute the appropriate source for these data, they do not dispute the method for calculating the amount of NET's net conduit investment. Based on NET's 1990 Form M, NET's net conduit investment is \$299,992,618 (Exh. GM-3, Table 4).²⁴

In order to calculate NET's annual conduit costs (i.e., the carrying cost of conduit), it is necessary to multiply the net conduit investment by the carrying charge. Based on NET's 1990 Form M and the Department-approved rate of return, the carrying charge is 29.35 percent (Exh. GM-3, Tables 4 and 5). Thus, NET's carrying cost of conduit is \$88,047,833.

2. Usable Space

In order to calculate the fully allocated conduit carrying cost on a per-foot basis, we first must determine the total

²⁴ NET's gross conduit investment is \$458,427,000; its accumulated depreciation for conduit is \$112,106,787; and its accumulated deferred income taxes for conduit as a proportion of total plant in service are \$46,327,595 (Exh. GM-3, Table 4).

number of duct feet to which costs shall be allocated. NET's 1990 Form M indicates that NET's conduit system consists of 161,504,640 duct feet (Exh. GM-3, Table 4). However, in order to determine the measure of duct feet to which costs shall be allocated, G.L. c. 166, § 25A must be read together with D.P.U. 930, the Department's Order adopting regulations for conduit and pole attachments. In its interpretation of the statutory standard, the Department considered usable space, rather than total conduit capacity, to be the proper measure when it defined the proportional share of the pole or conduit occupied by the attacher as "the space occupied by the [attacher] divided by the total usable space." D.P.U. 930 (1984), p. 5. Therefore, in calculating the fully allocated cost on a per-foot basis, we must identify "usable" duct feet.

Usable space, as defined by the Massachusetts statute and Department regulations is "... the total space which would be available for attachments, without regard to attachments previously made ... within any telephone or telegraph duct or conduit." According to NET, sheath feet are representative of attachments previously made (Tr. 3, p. 11). Therefore, NET's use of sheath feet as a proxy for usable space clearly conflicts with the Department's regulations. The Department will base its determination of usable space on the number of feet reported in NET's Form M, as adjusted to reflect the portion of the amount reported on Form M that is not usable for attachments.

We disagree with NET's contention that 15 percent of its conduit system is unusable because of its physical (e.g., collapsed) condition. At least some portion of the conduit that NET characterizes as unusable may be repaired, and also, such repair may be done at the attachers' expense. Therefore, we consider these duct feet to be usable for attachments, and, accordingly, find that it would be inappropriate to subtract an estimate of physically damaged conduit from the amount of duct feet indicated on Form M.

The record also indicates that NET reserves two ducts per trench foot for maintenance and for municipal use (Exh. DPU-41).²⁵ We disagree with Greater Media's assertion that because NET uses certain space for maintenance it should therefore be included in the total quantity of usable space. These duct feet are clearly "usable" in the plain sense of the word, but, because they are not available for attachments, they are not usable according to the definition that governs the Department's resolution of attachment complaints. Therefore, for the purpose of calculating fully allocated costs, we consider space that NET reserves for maintenance to be unusable.

Regarding duct reserved for municipal purposes, the record indicates that NET reserves one duct for municipal purposes in all but two municipalities in which it maintains conduit (RR-DPU-9). NET indicated that, in limited instances, it has

²⁵ There are, on average, 5.7 duct feet per trench foot of NET's conduit system (Exh. GM-3, Table 10).

used duct that was set aside for municipalities, but that it restores the duct to municipal purposes as soon as possible (RR-DPU-11, NET's response). Although some communities may not use the duct that NET sets aside for municipal purposes, there is no evidence to suggest that, with the exception of Worcester, NET uses such duct on a regular basis. The record indicates that the use of municipal duct in Worcester is the exception and not the norm, and therefore, we find it reasonable to consider municipal duct unusable for attachers.

Based on the foregoing, it is appropriate to modify the Form M data to reflect the space that is unusable because it is reserved for maintenance and for municipalities. There are no data available, however, that would enable a precise determination of the duct that is reserved for these two purposes. Based on NET's estimate that it reserves two duct feet of every trench foot for municipal and maintenance purposes, and based on NET's data, we find it reasonable to assume that 35 percent of the duct feet that are reported in Form M are unusable.²⁶ Using this percentage and applying it to the data

²⁶ In its June 1990, Quarterly Report Number 7A ("QR7A"), NET identified 159,693,600 total duct feet and 5,260 total trench miles. NET estimated that two ducts per trench foot are reserved for municipal use and maintenance. Therefore, to estimate the amount of reserved conduit, first, 5,260 total trench miles are multiplied by 5,280 feet per mile for a total of 27,772,800 trench feet. Then, because NET estimates that two ducts per trench foot are reserved for municipal use and maintenance, the total trench feet figure is doubled to estimate 55,545,600 feet of reserved duct feet. Finally, NET's estimate of reserved duct is 34.78 percent of the total reported duct feet (Exh. DPU-41).

in NET's 1990 Form M, the amount of total usable space for conduit attachment purposes is 105,329,113 feet.²⁷

3. Fully Allocated Cost per Foot of Full Duct

In section III.B.1, supra, we determined that NET's carrying cost of conduit is \$88,047,833. Dividing that amount by the amount (in duct feet) of usable space established in section III.B.2, supra, yields a fully allocated cost per foot of full duct of \$0.84.

4. Full Duct vs. Half-duct

Under its standard licensing agreement, NET currently charges \$0.95 per year for a foot of half-duct if the licensee's cable is in a duct occupied by NET's cable or the cable of another authorized user of the licensor's conduit system (Tr. 3, p. 49; Complaint, Exhibit B, Appendix 1). NET charges for a full duct where the licensee's cable is placed in a vacant duct (id.). As noted, there is disagreement between the parties as to the propriety of NET charging the full conduit rate for attachment in previously vacant conduit.

We agree with Greater Media that since attachers require the use of a half-duct only, and that use does not preclude the use of the other half of the conduit, the attacher should only be charged for a half-duct. Accordingly, unless an attacher's conduit precludes subsequent use by NET or other attachers of the

²⁷ Subtracting the amount of reserved duct, 56,175,527 feet, from the total duct feet, 161,504,640 feet, yields the amount of usable space, 105,329,113 duct feet (Exh. GM-3, Table 4).

other half of the duct, attachers should pay only for a half-duct.

5. Summary of Directives

Based on our determinations above, we find that the current conduit attachment rates of \$1.90 per foot of full duct and \$0.95 per foot of half-duct exceed the fully allocated costs, as derived, supra, and therefore are not reasonable. We find that a reasonable rate should reflect the fully allocated cost per duct foot of conduit that is being rented. Accordingly, we direct NET to substitute in its current attachment agreements with Greater Media, retroactive to the date of the Complaint, the following rates:

FULL DUCT: \$0.84 per foot

HALF-DUCT: \$0.42 per foot

Upon the issuance of the 1991 Form M on May 21, 1992,²⁸ NET shall recalculate the conduit attachment rate using the 1991 Form M data and the fully allocated cost methodology adopted by the Department, supra. Effective July 1, 1992, NET shall substitute the recalculated rate in all of its conduit attachment license agreements. Also, NET shall recalculate the conduit attachment rate annually upon the issuance of its Form M and substitute the new rate in all of its conduit attachment agreements, effective July 1 of each year. Furthermore, NET shall incorporate a clause in all of its conduit license

²⁸ See note 22.

agreements indicating that conduit attachment rates shall be adjusted annually based on (1) the most recent Form M data; and (2) NET's latest intrastate rate of return, as determined by the Department.

As stated previously, the full duct rate shall be charged only where the licensee's attachment in a vacant duct precludes subsequent use of the duct by NET or other attachers. We direct NET to amend its attachment agreements to reflect this new definition of full duct.

In determining the appropriate rate for conduit attachment charges, the Department has considered the interests of subscribers of cable television services as well as the interest of consumers of utility services. NET stated that currently 0.16 percent of its intrastate Massachusetts revenue is received from conduit attachments (RR-DPU-7). Therefore, we find that any impact on NET ratepayers from this rate change will be minimal and will not require an adjustment in other rates.

With regard to CATV subscribers, Greater Media indicates that a decrease in rates will lessen pressure to increase cable rates and may cause a slight reduction in rates (Exh. DPU-15). Therefore, we find that the resolution of this case will have no adverse effect, and should have a beneficial effect, for cable television subscribers.

IV. ORDER

Accordingly, after due notice, hearing and consideration, it is hereby

ORDERED: That New England Telephone and Telegraph Company shall modify its license agreements with Greater Worcester Cablevision, Inc., Greater Chicopee Cablevision, Inc., Greater Oxford Cablevision, Inc., and Greater Millbury Cablevision, Inc., to incorporate a rate of \$0.84 per foot for occupying full duct conduit space, and a rate of \$0.42 per foot for occupying half-duct conduit space, and that said rates shall be effective as of October 21, 1991; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company shall modify all license agreements with occupants of its conduit space, effective July 1, 1992, to reflect rates based on 1991 Form M data; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company shall comply with all other directives contained herein.

By Order of the Department,

/s/ ROBERT C. YARDLEY, JR.

Robert C. Yardley, Jr., Chairman

A true copy
Attest:

MARY L. COTTRELL
Secretary

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).